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CHANGING PLAYING FIELDS: THE SPORTS ATTORNEY'S OBLIGATION TO LEARN GREEN

W. S. MILLER*

American society has seen explosive growth in the embrace of green practices over the past decade.¹ While the use of green has seen exponential growth over the past ten years, it is important to note that the green movement has much deeper roots in our society, extending back into the 1960s with the first Earth Day being staged in 1970.² This extensive recent history and three other elements currently present in our society make it likely that the country's developing embrace of green is likely to continue for the foreseeable future.

First, for a variety of reasons, a large portion of American society has decided to embrace green as part of its consumer practices. In a 2008 study conducted by the authors of *Greentailing and Other Revolutions in Retail*, fifty-nine percent of respondents indicated that green concerns actively or occasionally impacted their purchasing behavior.³ Fifty-four percent of respondents stated that retailers were not doing enough to be green.⁴

Second, a cottage industry focused on greening American business has developed over the past decade. In the facility development area, architecture firms whose practices are focused on green techniques have opened, and many major architecture firms have added green divisions to their overall practices.⁵ Major companies such as Frito-Lay, General Electric, and Wal-Mart have made green a large part of their business strategies going forward.⁶ New

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1. There are a variety of terms utilized to refer to eco-friendly practices including green, sustainable, and socially responsible just to name a few. For sake of ease and consistency, the term green will typically be utilized throughout this article as a catch-all term for these practices.

2. *Earth Day and EPA History*, EPA.GOV, <http://www.epa.gov/earthday/history.htm> (last visited Sept. 1, 2010).

3. NEIL Z. STERN & WILLARD N. ANDER, *GREENTAILING AND OTHER REVOLUTIONS IN RETAILING* 58 (2008).

4. *Id.* at 59.

5. *The Top 100 Green Design Firms*, ARCHRECORD.CONSTRUCTION.COM, July 2009, <http://archrecord.construction.com/news/daily/archives/090706top100greendesignfirms.asp>.

6. Kate Rockwood, *Attention, Walmart Shoppers: Clean-up in Aisle Nine*, FAST COMPANY, Feb.

companies have sprouted up that are focused on developing new energy-related devices and products. Energy-efficient lighting, appliances, and management software are becoming more prevalent. New, large-scale, and on-site devices that tap into renewable energy sources such as wind, solar, water, and biomass power come to market every year. Public and private entities are also continually developing certification systems that address a wide variety of green issues such as energy efficiency, building development, and even ownership. As a result of these efforts, new terms such as Leadership in Energy and Environmental Design (LEED) and Energy Star are seemingly becoming common knowledge for most consumers.

Finally, governmental policies have begun to change to reflect the continuing development and adoption of green practices by consumers and the business community. Many public and private bodies from coast-to-coast have developed financial incentives designed to encourage consumers and commercial entities to adopt green practices.⁷ Numerous jurisdictions have started adopting new laws, regulations, and practices, such as building codes, which mandate the use of green practices in both the public and private sectors.⁸ Finally, Maryland and Vermont recently amended their corporate governance law to allow for the development of new corporations that include a focus on social responsibility in their charters and business practices.⁹

The coalescence of these three developments has led to a seemingly continuous cycle, which ensures that green will continue to become an ever-increasing part of American society and business going forward. Consumers have expressed increasing demand for green. Businesses benefit from reduced expenses and financial incentives created by adopting green.¹⁰ Finally, governmental officials seeing the increasing popularity of green among the public and business sectors have begun implementing new laws and regulations that will only serve to further accelerate the adoption of green practices across the country.

1, 2010, at 30; GE: Ecomagination, ECOMAGINATION.COM, <http://www.ecomagination.com/> (last visited Sept. 1, 2010).

7. See *DSIRE: Financial Incentives for Energy Efficiency*, DSIREUSA.ORG, http://www.dsireusa.org/summarytables/fin_ee_printable.cfm (last visited Aug. 23, 2010); *DSIRE: Financial Incentives for Renewable Energy*, DSIREUSA.ORG, http://www.dsireusa.org/summarytables/fin_re_printable.cfm (last visited Aug. 23, 2010).

8. *DSIRE: Rules, Regulations & Policies for Energy Efficiency*, DSIREUSA.ORG, http://www.dsireusa.org/summarytables/rr_ee_printable.cfm (last visited Aug. 23, 2010).

9. Keith Chrostowski, 'B Corporations' Could Enable Companies to Do Good and Make Money, KAN. CITY STAR, Aug. 9, 2010, <http://www.kansas-city.com/2010/08/09/2139544/b-corporations-could-enable-companies.html> (last visited Sept. 1, 2010).

10. STERN & ANDER, *supra* note 3, at 58.

As one might suspect, the sports industry has not been immune to the still-developing green movement that is taking shape in our society. Organizations at all levels of sport have adopted a variety of green business practices. Whether starting basic recycling programs, implementing green-related promotion nights, or developing eco-friendly stadiums and arenas, the use of green business techniques has become common for teams, leagues, and facility owners. For example, major league organizations such as the Minnesota Wild, Philadelphia Phillies, and Tampa Bay Rays have made the adoption of green an integral part of their business and marketing efforts.¹¹

The purpose of this article is to examine how the sports attorneys who represent the aforementioned types of clients, such as teams and facilities, will be impacted by the growing influence of green on sports.¹² Part I provides a brief overview of the developing use of green business practices in the sports industry. Part II examines how professional responsibility requirements likely mandate that sports attorneys learn about the increasing connection between the green and sports industries. Finally, Part III is designed to help the sports attorney begin to satisfy these professional responsibility requirements by showing the representational challenges that might be created by the developing relationship between green and sports. An illustrative scenario that further examines the green and sports relationship and the potential issues this creates for the sports attorney is utilized to achieve this objective.

I. THE INCREASING ADOPTION OF GREEN PRACTICES BY THE SPORTS INDUSTRY

As noted in the introduction, the sports industry is no different than any other industry in our society, as it has seen explosive growth in terms of the development and adaptation of green business techniques. For example, the four major professional sports leagues have all implemented green-focused campaigns.¹³ In addition, numerous teams and facilities have utilized a

11. Glen Andresen, *A Winning Environment*, WILD.NHL.COM, Aug. 13, 2010, <http://wild.nhl.com/club/news.htm?id=535953>; *Red Goes Green*, PHILADELPHIAPHILLIES.COM, <http://philadelphia.phillies.mlb.com/phi/community/rgg/index.jsp> (last visited Sept. 1, 2010); *Team Green*, TAMPABAYRAYS.COM, http://mlb.mlb.com/tb/community/team_green.jsp (last visited Sept. 1, 2010).

12. Sports attorneys can represent a wide variety of clients including players, teams, leagues, participants, sponsors, and facilities, along with a myriad of other possibilities. For the purposes of this article, the term "sports attorney" is a catch-all term referring to attorneys who typically represent teams, leagues, facilities, and sponsors, the clients most likely to be affected by the implementation of green in sports.

13. *NBA Cares: NBA Green*, NBA.COM, <http://www.nba.com/green/> (last visited Sept. 1, 2010); *Team Greening Program*, MLB.COM, http://mlb.mlb.com/mlb/official_info/community/team_

variety of green techniques at the local level. There are several factors contributing to this past and likely future growth.

A. *Changing Consumer Base*

As was the case for the general consumer base as a whole, fans have expressed a desire to see sports organizations embrace green business practices. In 2008, ProGreenSports, a green sports consulting firm, conducted a nationwide survey of sports fans and found that approximately ninety percent of respondents would have a more positive impression of a professional sports organization that implemented an effective environmental program.¹⁴ The same survey found that seventy-five percent of respondents are willing to pay more for green products.¹⁵

Anecdotal evidence of sports fans' interest in green can be seen throughout the sports industry as well. A diverse group of sports organizations such as the Buffalo Sabres, Lake Elsinore Storm, and the Women's National Basketball Association, along with many others, have implemented a variety of green-themed fan initiatives over the past few years that have been very popular with fans.¹⁶

B. *Marketing and Promotions*

In light of the substantial fan interest for green identified in the previous section, it is not surprising that sports organizations have developed a series of promotions and marketing efforts designed to capitalize on and further develop this demonstrated interest.

Many sports organizations have staged giveaway nights where the items have an eco-friendly theme. Teams such as the Arizona Diamondbacks and Cincinnati Reds have given away green items for home use including light

greening.jsp (last visited Sept. 1, 2010); *NHL Green*, NHL.COM, <http://www.nhl.com/ice/eventhome.htm?location=/nhlgreen> (last visited Sept. 1, 2010); *Super Bowl Community Outreach*, NFL.COM, <http://www.nfl.com/superbowl/community> (last visited Sept. 1, 2010).

14. *2008 Sports Fan Survey Results*, PROGREENSPORTS.COM, http://www.progreensports.com/wordpress/?page_id=237 (last visited Apr. 9, 2010).

15. *Id.*

16. Benjamin Hill, *Minor League Teams Going Green*, MINORLEAGUEBASEBALL.COM, Mar. 14, 2008, http://web.minorleaguebaseball.com/news/article.jsp?ymd=20080313&content_id=359129&vkey=news_milb&fext=.jsp; *Blue & Gold Makes Green*, SABRES.NHL.COM, <http://sabres.nhl.com/club/page.htm?bcid=27020> (last visited Nov. 7, 2010); *WNBA and T-Mobile Team Up to Encourage Fans to Go Green*, WNBA.COM, May 26, 2010, http://www.wnba.com/news/wnba_tmobile_go_green_100526.html.

bulbs and energy efficient night-lights.¹⁷ Other teams such as the Cleveland Indians, Pittsburgh Pirates, San Diego Padres, and Texas Rangers implemented giveaways that revolved around team-branded green items such as baseball caps, tote bags, water bottles, or t-shirts.¹⁸

Some organizations have created a variety of green-themed promotions designed to tap into the aforementioned fan interest. Many teams have developed programs designed to educate fans about green efforts on a single night or annual basis, with the Atlanta Braves, Florida Marlins, Houston Astros, Kansas City Royals, and New York Mets among this group.¹⁹ Others, such as the Cincinnati Reds, Dallas Mavericks, Houston Rockets, and the Seattle Mariners, have implemented Earth Day activities, staged e-recycling events, or staged carbon-neutral events by purchasing carbon offsets.²⁰

Perhaps most importantly in light of a tough economy, the introduction and implementation of green-themed business techniques has created new revenue generation opportunities and brought in new sponsors for many sports organizations. The Boston Red Sox and Kansas City Royals are among the teams that have developed new pieces of sponsorship inventory by creating title sponsorships for their voluntary recycling team programs.²¹ The St. Louis Cardinals further demonstrated how going green can help create new inventory by securing sponsorship from Green Rivers Greenway and the Metro-East Park and Recreation District for their Bike to Busch events which were staged twice in 2010.²² The Midwest League's Great Lakes Loons and National Football League's (NFL) Philadelphia Eagles are among a group of

17. Ari Green, *APS, D-Backs and Fox Sports Arizona Promote Energy Efficiency During Green Series This Weekend*, DBACKS.COM, Apr. 19, 2010, http://mlb.mlb.com/content/printer_friendly/ari/y2010/m04/d19/c9422118.jsp; Mark Newman, *Baseball Embraces Spirit of Earth Day*, MLB.COM, Apr. 22, 2008, http://mlb.mlb.com/news/print.jsp?ymd=20080421&content_id=2567055&vkey=news_mlb&fext=.jsp&c-id=mlb.

18. *Major League Baseball Clubs Celebrate 40th Anniversary of Earth Day*, MLB.COM, Apr. 13, 2010, http://mlb.mlb.com/content/printer_friendly/mlb/y2010/m04/d13/c9270556.jsp.

19. *Id.*; *Caravan for Earth*, FLORIDAMARLINS.COM, http://mlb.mlb.com/fla/community/caravan_for_earth.jsp (last visited Mar. 12, 2010).

20. *Reds Players to Appear at E-Waste Recycling Drive on Earth Day*, REDS.COM, Apr. 21, 2010, http://mlb.mlb.com/content/printer_friendly/cin/y2010/m04/d21/c9468142.jsp; *Top 10 Team Initiatives*, NBA.COM, <http://nba.com/green/top10.html>; *Seattle Mariners Go Carbon Neutral on Earth Day*, SEATTLEMARINERS.COM, Apr. 18, 2008, http://seattle.mariners.mlb.com/content/printer_friendly/sea/y2008/m04/d18/c2547364.jsp.

21. *Red Sox Go Green*, REDSOX.COM, <http://mlb.mlb.com/bos/community/gogreen.jsp> (last visited Sept. 1, 2010); *Royals Introduce Green Team Initiative For 2010*, ROYALS.COM, Apr. 14, 2010, http://mlb.mlb.com/content/printer_friendly/kc/y2010/m04/d14/c9291072.jsp.

22. *Cardinals Announce First Annual Green Week at Busch*, STLCARDINALS.COM, Apr. 22, 2010, http://mlb.mlb.com/content/printer_friendly/stl/y2010/m04/d21/c9467702.jsp.

several teams that have created a new revenue stream by selling green-friendly merchandise.²³ The Loons sell sweatshirts in which seventy percent of the material comes from recycled soda bottles.²⁴ The Eagles include a variety of organic and recycled apparel along with eco-friendly cheerleader calendars among their offerings.²⁵

In terms of sponsorship, the Seattle Storm and the Atlantic League's Long Island Ducks are among the professional sports organizations and facilities that have developed green-themed sponsorship partner rosters.²⁶ In addition, new eco-friendly sponsors such as Esurance, Green Life, and Pentair are among the companies that struck deals with professional sports organizations in recent years.²⁷

C. Operations

The positive financial effects of green extend beyond development of new revenue-generation opportunities. Green operating techniques implemented by teams over the past few years have allowed teams and facilities to reduce operating expenses in a number of ways.

In the front office, many sports organizations have substantially reduced printing costs by implementing green techniques designed to reduce or eliminate the need for printed versions. For example, the National Hockey League has mandated that all teams create electronic media guides.²⁸ Other teams such as the Minnesota Wild and Houston Astros have implemented electronic ticketing systems, which allows patrons to use their credit card, driver's license, or a stored card to gain admittance to the stadium or arena in lieu of printed tickets.²⁹

23. *Philadelphia Eagles Go Green Products*, PHILADELPHIAEAGLES.COM, http://store.philadelphiaeagles.com/Philadelphia-Eagles-Go-Green-Merchandise-_1216532596_pg.html (last visited Sept. 1, 2010); Hill, *supra* note 16.

24. Hill, *supra* note 16.

25. *Philadelphia Eagles Go Green Products*, *supra* note 23.

26. *Official Website of the Long Island Ducks*, LIDUCKS.COM, <http://www.liducks.com/index.cfm?fuseaction=gogreen> (last visited Feb. 5, 2009); *STORM: Go Green*, WNBA.COM/STORM, <http://www.wnba.com/storm/gogreen.html> (last visited Aug. 18, 2010).

27. *For Some Properties, Going Green Means Getting Green*, IEG SPONSORSHIP REPORT, Feb. 4, 2008, at 1; *Insurance Marketer Leverages to Promote Green Message*, IEG SPONSORSHIP REPORT, Jan. 21, 2008, at 1; *Minnesota Twins and Pentair Announce First-Of-Its-Kind Sustainable Water Solution in Major League Sports*, TWINSBASEBALL.COM, Jan. 12, 2010, http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20100112&content_id=7905272&vkey=pr_min&fext=.jsp&c_id=min.

28. James Fink, *NHL Players Drive Green Effort*, BUS. FIRST BUFFALO, Nov. 14, 2008, available at <http://buffalo.bizjournals.com/buffalo/2008/11/17/story9.html>.

29. *Paperless E-Tickets – Minnesota Wild Green Initiative*, WILD.NHL.COM, <http://etickets>.

While embracing green in the front office has allowed sports entities to secure some savings, even larger financial benefits have been realized through changing facility operations. For example, the Seattle Mariners saved approximately \$290,000 in one year after implementing a recycling program along with a series of energy efficiency techniques at Safeco Field.³⁰ Minnesota's Target Field has a \$200,000 rainwater recycling system that is projected to save more than two million gallons of water annually.³¹ The Philadelphia Eagles installed new energy-efficient boilers at Lincoln Financial Field, which cost two million dollars, but paid for themselves far in advance of original projections.³² The Illinois Sports Facility Authority and the Chicago White Sox saved an estimated \$400,000 by installing a new 265,000 square-foot permeable parking lot consisting of 527,616 paving blocks at U.S. Cellular Field.³³ The San Francisco Giants installed a new sustainable garlic fries stand which featured Henny Penny Open Fryers that cut utility costs by more than half, Coca-Cola Energy Management System Coolers that reduce energy consumption by 35% and lighting that reduces energy usage by 36.5%.³⁴ The Memphis Grizzlies were even able to turn an expense item into a revenue producer by instituting a cardboard recycling program, which generates \$6,000 to \$10,000 each year.³⁵

D. Facilities

Finally, and perhaps most importantly, sports facilities and the way they are designed, constructed, and operated are also changing because of the implementation of green in the sports industry. From a design perspective, teams such as the Washington Nationals, Minnesota Twins, and Pittsburgh Penguins have all recently opened new facilities that have been certified as

wild.com (last visited Sept. 1, 2010); *Astros 2010 Play Green Campaign Launches Thursday, April 22 in Celebration of Earth Day*, ASTROS.COM, http://mlb.mlb.com/content/printer_friendly/how/y2010/m04/d20/c9435688.jsp (last visited Apr. 26, 2010).

30. Bill King, *Seeds of Opportunity*, SPORTS BUS. J., Nov. 10, 2008, at 15.

31. Paul Walsh, *Earth-friendly Target Field is Certifiably 'Green,'* STARTRIBUNE.COM, Apr. 9, 2010, <http://www.startribune.com/local/90210102.html>.

32. King, *supra* note 30.

33. Mike Nolan, *Bridgeview Firm Installs 'Green' Lot at Sox Park*, DAILY SOUTHTOWN, Apr. 11, 2008, available at <http://southtownstar.com/business/888984,0411cellblocks.articleprint>; *Unilock Supplies Record Permeable Pavement for U.S. Cellular Field Lot*, WHYPAVEGREEN.ORG, Apr. 15, 2008, <http://www.whypavegreen.org/pdf/Unilock-supplies-record-permeable-pavement-for-US-Cellular-Field-lot.pdf>.

34. *San Francisco Giants Unveil Plans for a GREEN 2009 Season*, SFGIANTS.COM, Apr. 1, 2009, http://mlb.mlb.com/content/printer_friendly/sf/y2009/m04/d01/c4103788.jsp.

35. Don Muret, *Venues Turn to Recycling for Long-term Savings*, SPORTS BUS. J., Nov. 10, 2008, at 25, available at <http://www.sportsbusinessjournal.com/article/60572>.

eco-friendly by third-party certification firms.³⁶ Existing facilities such as AT&T Park, Philips Arena, and Portland's Rose Garden have all recently secured similar certification.³⁷ New governmental mandates and building codes requiring the use of green techniques such as meeting energy efficiency standards or requiring the aforementioned third-party eco-friendly certification mean this trend is likely to continue.

Another developing facility issue is the inclusion of green-related issues in sports facility financing plans and leases. For example, the aforementioned Target Field project included a combined \$2.5 million in required contributions from the team and the state to pursue LEED certification.³⁸ Upon the opening of Target Field, Jerry Bell, President of Twins Sports, Inc., stated the following about the inclusion of this requirement in the financing plan by state senator Linda Higgins: "We didn't know what that was; we're scrambling around and everyone was giving us these horror stories that it'll cost so much money, you'll have to add to your budget, blah, blah . . . We're really, really happy that she did that."³⁹ In addition to the aforementioned cost savings, the team was also able to secure eco-friendly sponsors due in part to the green attributes of the facility.⁴⁰ Again, in light of the success of the Target Field project on a variety of levels, the sports industry is likely to see more of these certification-related requirements included in future stadium and arena financing packages.

To sum up the developing connection between green and sports, as was the case for the general business sector, it seems as though a continuous cycle has developed. In fact, it is hard to envision a scenario in which the sports industry will be able to turn back the clock on the adoption of green. Sports-

36. *The Twins' Target Field Scores as a Green Building All-Star*, GREENBIZ.COM, Apr. 9, 2010, <http://www.greenbiz.com/news/2010/04/09/twins-target-field-scores-green-building-all-star>; *CONSOL Energy Center is First NHL Arena to Achieve LEED Gold Certification*, PENGUINS.NHL.COM, Aug. 4, 2010, <http://penguins.nhl.com/club/news.htm?id=535495>.

37. Dylan Rivera, *Rose Garden Arena Goes Green With Energy Efficiency, Food Composting, Bike Parking*, OREGONLIVE.COM, Jan. 26, 2010, http://www.oregonlive.com/portland/index.ssf/2010/01/rose_garden_arena_goes_green_w.html; *Philips Arena Gains Coveted LEED Certification*, NHL.COM, Apr. 6, 2009, <http://www.nhl.com/ice/news.htm?id=416894>; *AT&T Park Becomes the First Major League Ballpark to Receive LEED Silver Certification for Existing Buildings, Operations and Maintenance*, SFGIANTS.COM, Apr. 21, 2010, http://mlb.mlb.com/content/printer_friendly/sf/y2010/m04/d21/c9471154.jsp.

38. Mike Cook, *Target Field Gets LEED Certification*, TWINSBASEBALL.COM, Apr. 8, 2010, http://minnesota.twins.mlb.com/news/print.jsp?ymd=20100408&content_id=9142070&vkey=news_min&fext=.jsp&c_id=min.

39. *Id.*

40. *Minnesota Twins and Pentair Announce First-Of-Its-Kind Sustainable Water Solution in Major League Sports*, *supra* note 27.

facility design and operation have already been irrevocably changed by the development of green. The incorporation of green marketing techniques and community initiatives has proven to be attractive to a significant amount of fans. And, green techniques have been reducing operating expenses and creating new revenue streams for organizations at all levels of sport. If anything, the industry is likely to see more and more organizations and facilities embrace green with each passing year. To that point, a 2009 survey conducted of professional sports teams by ProGreenSports showed that sixty percent of respondents viewed sustainability initiatives as a high or very high priority for their organizations.⁴¹

The net effect of the developing influence of the green business movement on sports is represented by a substantial change in the way entities in the industry operate. Marketing and promotions have changed. Facilities are constructed and operated in new ways. And new owners are coming into professional sports with a green-focused operational focus. These substantial changes in the sports industry mean that the sports attorneys who represent clients such as teams, facilities, and leagues need to consider how these developments will impact the way that they represent these clients.

II. THE PROFESSIONAL RESPONSIBILITY REQUIREMENTS FOR THE SPORTS ATTORNEY WITH REGARD TO GREEN

Despite the aforementioned explosive growth and utilization of green concepts over the past five years in both the sports industry and business as a whole, there are still many skeptics who have been reluctant to embrace this change. In fact, despite voluminous evidence to the contrary, some observers might still believe that the adoption of green business practices is a passing fad that will not have a profound change on the sports industry.

These divergent views may lead the sports attorney to ask whether it is necessary to study green under the current rules of attorney regulation. In essence, the key question becomes: does the sports attorney have to change the way they interact with and represent clients because of the still developing green movement? The answer to this question appears to be a definitive yes for the Wisconsin attorney. And while the focus of the professional responsibility analysis in this article is on Wisconsin-licensed attorneys, it is likely that similar requirements exist in most jurisdictions.

To be sure, the analysis that leads to this conclusion is rather straightforward. The ethical rules that appear to require sports attorneys to

41. 2009 Pro Team Survey Results, PROGREENSPORTS.COM, http://progreensports.com/wordpress/?page_id=173 (last visited Mar. 26, 2010).

study green are among the most basic tenets of law school professional responsibility classes. But, three key professional responsibility rules and their accompanying comments strongly suggest that sports attorneys need to incorporate the analysis of green's effect on the sports industry into their practice.

A. SCR 20:1.1 Competence

The first rule that the sports attorney needs to consider in this area is the very first rule that the Wisconsin Supreme Court requires attorneys to follow in the practice of law, Supreme Court Rule (SCR) 20:1.1. This rule, dealing with attorney competence, requires that "[a] lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁴² In light of the previously discussed developments in the industry, it seems likely that this would require the sports attorney to know and understand green.

In addition to the stated rules, the Wisconsin Supreme Court also utilizes comments from the American Bar Association (ABA) Model Rules of Professional Conduct to provide further guidance for Wisconsin attorneys. In this particular situation, two of the comments under this rule appear to provide further direction for the sports attorney as to the level of preparation that is required.

1. ABA Comment Five: Thoroughness and Preparation

When discussing the level of thoroughness and preparation required from attorneys, Comment Five states, "It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence."⁴³

As discussed at various points throughout this article, the developing relationship between green and the sports industry penetrates virtually every level of that relationship. The sports attorney could be required to make recommendations on green requirements in financing documents for a new or renovated sports facility, review building codes and design plans to ensure a facility is in compliance, or work with fellow professionals to secure third-party certification of a stadium, arena, practice facility, or sports complex as required in a lease or financing documents struck with a municipality.

42. WIS. SUP. CT. R. 20:1.1

43. MODEL RULES OF PROF'L CONDUCT R. 1.5 cmt. (2010).

It would be hard to argue that any of these attorney-client interactions do not rise to the level of a complex transaction. Each of these aforementioned situations and most of the others discussed throughout this article would likely create financial implications for the client that could easily rise to the tens, if not hundreds, of millions of dollars depending upon the exact circumstances of the representation. As such, it seems incumbent upon the sports attorney to “extensively” review the potential green-related issues that could affect their clients.

2. ABA Comment Six: Maintaining Competence

The ABA comments go on to discuss how attorneys are required to maintain competence as they practice their profession. Comment Six specifically states, “To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.”⁴⁴

Again, as demonstrated throughout this article, the sports industry is currently experiencing two main types of changes because of green practices that the sports attorney needs to be cognizant of. First, many different business practices are changing, which require the sports attorney to rethink how contracts are negotiated and drafted. Concessionaire agreements that emphasize recycling and energy efficient practices could become standard practice. Sponsor contracts with green-focused advertisers could become commonplace. Ticketing agreements that address the use of virtual tickets will be important. Second, the law itself is changing to reflect a growing appetite for green. Building codes are being modified around the country to incorporate green techniques.⁴⁵ As previously discussed, Maryland and Vermont have already implemented benefit corporation legislation that allows for new corporate structures that emphasize a broader variety of considerations for corporate executives to consider when running business organizations.⁴⁶ All of these changes require the sports attorney to study green business practices and the changing law when preparing to represent clients.

B. SCR 20:2.1 Advisor

The next professional responsibility rule that sports attorneys have to be cognizant of relates to their role as advisors to clients. SCR 20:2.1 states that

44. MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. (2010).

45. *DSIRE: Rules, Regulations & Policies for Energy Efficiency*, *supra* note 8.

46. Chrostowski, *supra* note 9.

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social, and political factors that may be relevant to the client’s situation.”⁴⁷

It seems likely that a sports attorney’s potential discussion of green business techniques would hit on all of these “other considerations” articulated by the aforementioned rule. As was the case with SCR 20:1.1, the Wisconsin Supreme Court utilizes comments from the ABA Model Rules of Professional Conduct to provide further guidance for attorneys.

1. ABA Comment One: Scope of Advice

The first ABA comment provided under SCR 20:2.1 appears to be the most direct argument that sports attorneys need to be aware of green issues when representing clients. The exact language of Comment One is as follows:

Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical consideration in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.⁴⁸

There are two key elements present in this comment that sports attorneys seemingly need to consider when representing clients. The challenge for the sports attorney is that Comment One lays out these two requirements in side-by-side fashion, but trying to achieve both objectives could be very difficult if working with a client to implement a full green business initiative.

The first issue stated in the Comment indicates that sports attorneys should consider the potential cost issues when providing advice to their clients. This can be a challenging assessment for the sports attorney to make as it can require advising a client about balancing potentially higher up-front tangible capital costs versus anticipated, but potentially unrealized, reduced long-term operating expenses. This will require working in conjunction with a wide variety of professionals. As one might suspect, this analysis and subsequent

47. WIS. SUP. CT. R. 20:2.1

48. MODEL RULES OF PROF’L CONDUCT R. 2.1(1) cmt. (2010).

advice will have a direct impact on financing, lease, and other contract negotiations.

The second issue raised in the comment suggests that what attorneys should consider when providing advice to clients is the potential “effects on other people.” This is perhaps the most challenging statement for sports attorneys because it is the most nebulous in terms of potential interpretation. The sports industry is one that has a substantial impact on virtually every element of our increasingly global society. This provides a substantial challenge for sports attorneys who are trying to take a variety of factors—such as the moral, economic, and social impacts of their client’s entity—into account as they contemplate the best advice that they can provide. For example, sports organizations travel around the world on a daily basis. Teams need to get from point A to point B to participate in events, while the strongest green advocates would likely point out that any such travel could have negative “effects on other people,” to use the language found in the comment. The potential dilemma sports attorneys face in this regard with regard to providing advice to clients was seen during the staging of the 2010 Winter Olympic Games in Vancouver, British Columbia. Kathryn Molloy, the Executive Director of Sierra Club in British Columbia, served as an advisor to the Vancouver Organizing Committee on sustainability issues and told *Emagazine.com* that “[t]he most sustainable Olympics would be no Olympics.”⁴⁹ This illustrates the difficult balancing act the sports attorney faces under Comment One as they contemplate the best course of action for their clients to pursue with regard to the green development and operation of their business entities.

2. ABA Comment Three: Scope of Advice

The next comment under SCR 20:2.1 applicable to the utilization of green business practices in sports addresses the attorney’s role in interacting with fellow professionals and how to assist clients in utilizing their advice.

Matters that go beyond strictly legal questions may also be in the domain of another profession . . . [B]usiness matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a

49. Martin Westerman, *Are the Games Really Green?* EMAGAZINE.COM, <http://www.emagazine.com/view/?4980> (last visited Apr. 15, 2010).

recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.⁵⁰

This is clearly another area where the intersection of green and the sports industry comes into play for the sports attorney. For example, the sports attorney could find it necessary to work with or solicit advice on behalf of a client from architects, engineers, construction experts, green building experts, or advocacy groups, just to name a few.

As stated in Comment Three, the sports attorney appears to have two key obligations in this area. First, the sports attorney has to possess the ability to recognize the need for outside expertise. In this situation, developing expertise or working with persons with an expertise in building certification and construction using LEED or other similar systems could be beneficial.⁵¹ Second, the sports attorney has to possess the ability to identify the best course of action for the client in the face of potentially conflicting pieces of advice from these various experts. It is important to note that both of these obligations require the sports attorney to have an understanding of the underlying issues in order to analyze them properly and provide the client with the best course of action.

3. ABA Comment Four: Offering Advice

The final comment under SCR 20:2.1 relevant to our particular situation requires the sports attorney to provide advice regarding a client's proposed action, even if the client did not ask for it.

In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation.⁵²

50. MODEL RULES OF PROF'L CONDUCT R. 2.1(3) cmt. (2010).

51. See Brian D. Anderson, *Legal and Business Issues of Green Building*, 79 WIS. LAWYER 8, Aug. 2006, available at http://www.wisbar.org/am/template.cfm?section=wisconsin_lawyer&template=/cm/contentdisplay.cfm&contentid=59720.

52. MODEL RULES OF PROF'L CONDUCT R. 2.1(4) cmt. (2010).

As noted earlier, while the use of green practices is growing in the sports industry, there are still many who express hesitation at their use for a variety of reasons. It is easy to envision a scenario in which a client tells an attorney that they plan on not implementing a variety of green practices at their stadium or arena for any number of reasons. These could include increased up-front capital costs or the client's honest belief that the use of green is merely a passing fad. Both of these are potentially valid concerns for the client, but if there is a building code requiring the use of green, a recycling mandate exists in that municipality, or the team's lease or facility financing requires the use of certain green practices, it will be incumbent upon the sports attorney to notify the client of the potential consequences of this decision. As such, the sports attorney will need to be aware of these green techniques and the requirements present in the law or the various facility-related documents.

C. SCR 20:8.4 Misconduct

The last professional responsibility rule important for the sports attorney considering green business issues is SCR 20:8.4, which is a rule implementing all of the other rules, including those previously discussed in this section.⁵³ In essence, it is an enforcement rule, stating that failure to follow any of the other rules is professional misconduct.

Three subsections appear to be relevant to this discussion for Wisconsin attorneys. The first of these rules is also included in the ABA Model Rules.⁵⁴ The last two rules are found only in Wisconsin. SCR 20:8.4(a) states that it is professional misconduct for an attorney to "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another[.]"⁵⁵ SCR 20:8.4(f) states it is professional misconduct for an attorney to "violate a statute, supreme court rule, supreme court order or supreme court decision regulating the conduct of lawyers[.]"⁵⁶ Finally, SCR 20:8.4(g) states that it is professional misconduct for an attorney to "violate the attorney's oath[.]"⁵⁷

The net effect of the three aforementioned professional responsibility rules and their accompanying ABA comments is that it appears the Wisconsin-licensed sports attorney has a clear duty to study green issues and be prepared to discuss them with clients in the normal course of representation. Simply

53. See WIS. SUP. CT. R. 20:8.4 (2010).

54. See *generally* MODEL RULES OF PROF'L CONDUCT (2010).

55. WIS. SUP. CT. R. 20:8.4(a).

56. WIS. SUP. CT. R. 20:8.4(f).

57. WIS. SUP. CT. R. 20:8.4(g).

stated, the ongoing changes in the sports industry, the increasing use of green business practices, and the imposition of various requirements by governmental bodies seemingly require that green be added to the sports attorney's representational checklist.

III. THE POTENTIAL KNOWLEDGE REQUIREMENTS SPORTS ATTORNEY HAVE WITH REGARD TO GREEN

As noted in the previous section, the Wisconsin Supreme Court Rules of Professional Conduct for Attorneys seem to clearly indicate that the sports attorney has a duty to address a wide variety of green-related issues when representing clients. However, as is the case with other areas of the law, these rules do not specifically express what the sports attorney needs to consider as part of this process.

To be sure, the concept of studying the interaction between "going green" and the sports industry likely sounds challenging to the sports attorney for two reasons. First, it is a multi-dimensional issue that affects how the sports attorney has to think about team ownership, facility design, facility finance, and marketing among a wide variety of potential client issues. In essence, sports attorneys have to be cognizant of the fact that green concepts can permeate virtually every representational area in which they work with clients. Second, in light of this, the development of green is a new development, which could require sports attorneys to re-evaluate many of their standard thought processes and checklists created to facilitate client representation.

In reality, the marriage of green and sports should not be overly challenging for most sports attorneys. The implementation of green will likely be a simple overlay on top of the existing knowledge base the sports attorney already possesses about the sports industry and client representation process. It will require developing additional knowledge about green concepts and asking additional questions of the client and other professionals. But, it is unlikely that this additional work will be a dramatic change for most sports attorneys.

As any law student or former law student can attest with dread, the easiest way to identify the issues that an attorney can face in the representation of a client is through the use of a fact pattern or illustrative scenario. As such, I have chosen this approach to show how sports attorneys might consider the implementation of green as they represent clients.

The assumptions of this illustrative scenario are as follows: The sports attorney has a new client who is an individual investor. As the engagement begins, the sports attorney discovers that the client has four main objectives the client wishes to achieve. First, the client wants to acquire a sports

franchise and create a new corporate entity. Second, the client wishes to build a new sport facility to house the team. This new facility will obviously need to satisfy all existing law and codes. The client also indicates a desire to secure as much financial assistance from the public and private sectors as possible in order to avoid using her own capital. Third, the client wishes to operate the facility and the team in the way that will generate the most profit possible. Finally, the client tells the sports attorney that she wishes to operate the team in the “greenest” way possible. In light of these assumed facts, the question becomes what representational issues does this sports attorney face?

A. Defining “Green” For the Sports Client

The first and most important representational issue that the sports attorney needs to consider in this illustrative scenario is the last item raised by the mock client, that is, devising a plan to operate the team in the “greenest” way possible. It is also quite possible that this will be the most challenging issue that the sports attorney will face throughout this whole scenario.

The reason this issue might be the most challenging for the sports attorney is that no clear standards have emerged in the sports industry to illustrate what constitutes a “green” sports organization. As shown throughout this article, there are a variety of ways in which green business can intersect with sports organizations. As such, it will be incumbent upon the sports attorney to have a long discussion with the client early in the representation to determine the level of green that the client wishes to pursue. And, if the attorney has an ongoing representation arrangement with the client, it will likely be necessary for the attorney to continually address this issue with the client as new green business techniques and technologies are created.

The challenge that the sports attorney faces in defining green with the client can be seen by examining the efforts to date of several professional sports organizations. The five teams that have been at the forefront of the green sports movement and all could make legitimate claims that they have “gone green” to their sponsors, fans, and community. Yet, these teams have taken vastly different approaches toward their implementation of green.⁵⁸

1. State College Spikes

The State College Spikes are a member of the New York-Penn League, which plays at the short-season class-A level of Minor League Baseball.⁵⁹

58 Don Muret, *Planning Kept Penn State Ballpark on Budget*, SPORTS BUS. J., at 24.

59. *New York-Penn League – State College Spikes About*, MINORLEAGUEBASEBALL.COM, http://web.minorleaguebaseball.com/team4/page.jsp?ymd=20090501&content_id=574912&vkey=tea

The team shares Medlar Field at Lubrano Park, a 5,400-seat, \$30 million stadium, with Penn State University.⁶⁰ The facility was the first-ever LEED certified stadium in the world upon its opening in 2006.⁶¹

In addition to playing at a LEED-certified facility, the Spikes have undertaken a variety of other green-focused business efforts. The team has utilized “going green” theme promotion nights for the past several years. Giveaway items have included aluminum water bottles, eco-friendly cooler bags, hemp jerseys, reusable grocery bags, and baseball cards printed on recycled paper.⁶²

In 2009, the Spikes hosted what they called the “first green All-Star Game in Minor League Baseball history” when they hosted the 2009 New York-Penn League All-Star Game.⁶³ Programs for the game were printed on recycled paper and a variety of displays educating fans on green practices were part of the events for the evening.⁶⁴ In 2010, the team also hosted a “Climate Change Night.”⁶⁵

2. Houston Astros

Major League Baseball’s Houston Astros play in Minute Maid Park.⁶⁶ While the facility is not LEED certified, the team utilizes a variety of green-friendly operating techniques at the facility, including using eco-friendly field chemicals and cleaning products, composting grass clippings, recycling grease for fuel, and using an extensive recycling campaign.⁶⁷

The Astros’ main green-related focus appears to be on its community

m4_t11748&fext=.jsp&sid=t1174 (last visited Sept. 2, 2010).

60. Muret, *supra* note 58.

61. *LEED Certification: State College Spikes Medlar Field at Lubrano Park*, MINORLEAGUEBASEBALL.COM, http://web.minorleaguebaseball.com/team1/page.jsp?ymd=20090401&content_id=547906&vkey=team1_t11748&fext=.jsp&sid=t1174 (last visited Mar. 26, 2010);

62. *Going Green Series Headlines Theme Nights*, MINORLEAGUEBASEBALL.COM, http://statecollegespiques.com/news/index.html?article_id=486&content_type=printable (last visited Apr. 28, 2008); *Spikes Finalize 2010 Promo Schedule*, MINORLEAGUEBASEBALL.COM, http://web.minorleaguebaseball.com/news/print.jsp?ymd=20100421&content_id=9468684&vkey=pr_t1 (last visited Sept. 2, 2010).

63. *Spikes Detail ‘Green’ Theme for All-Star Game*, MINORLEAGUEBASEBALL.COM, July 30, 2009, http://www.minorleaguebaseball.com/news/article.jsp?ymd=20090730&content_id=6156686&vkey=pr_milb&fext=.jsp.

64. *Id.*

65. *Spikes Finalize 2010 Promo Schedule*, *supra* note 62.

66. *Astros Play Green*, ASTROS.COM, http://houston.astros.mlb.com/hou/community/play_green.jsp (last visited Aug. 18, 2010).

67. *Id.*

initiatives. The team names an “Environmental Community Group of the Week” during each of its home stands.⁶⁸ The team also stages a green classroom contest, works on community gardens, plants trees, builds eco-friendly homes for Habitat for Humanity, and has a “Green Squad” that attends community events.⁶⁹

The team also focuses many of its green efforts into the promotion and operation side of the business.⁷⁰ Past efforts have included Earth Day promotions and giveaway nights featuring environmentally friendly items such as reusable grocery bags and hats made from recycled plastic bottles.⁷¹ The team also uses an optional virtual ticketing campaign and uses partial post-consumer recycling stock for sales and marketing materials.⁷²

3. Washington Nationals

The Washington Nationals play in Nationals Park, a 41,546-seat facility located in the Capitol Riverfront area of Washington, D.C., which opened in March 2008.⁷³ The facility was the first major league stadium to achieve LEED certification and the first stadium to be LEED Silver Certified.⁷⁴ Nationals Park was built on a twenty-five-acre Brownfield redevelopment site and features an extensive storm water management system because of its location adjacent to the Anacostia River.⁷⁵ Other green-friendly features include a 6,300-square foot green roof, a reflective roof, water conserving plumbing fixtures, which save a projected 3.6 million gallons of water annually, and drought resistant landscaping.⁷⁶ The team also celebrated Earth Day in 2010 by offering a “Green Tour at Nationals Park,” a stadium tour that examined the eco-friendly features of the facility.⁷⁷

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Nationals Park Facts and Figures*, NATIONALS.COM, http://washington.nationals.mlb.com/was/ballpark/facts_figures.jsp (last visited Aug. 18, 2010).

74. *Id.*

75. *Green Ballpark*, NATIONALS.COM, http://washington.nationals.mlb.com/was/ballpark/green_ballpark.jsp (last visited Aug. 18, 2010).

76. *Nationals Park – Washington D.C.*, NATIONALS.COM, http://washington.nationals.mlb.com/was/downloads/was_green_ballpark.pdf (last visited Sept. 2, 2010).

77. *Washington Nationals Celebrate 40th Anniversary of Earth Day*, NATIONALS.COM, Apr. 20, 2010, http://mlb.mlb.com/news/press_releases/press_release.jsp?ymd=20100420&content_id=9435672&vkey=pr_was&fext=.jsp&c_id=was.

4. St. Louis Cardinals

The St. Louis Cardinals play in Busch Stadium, a non-LEED certified facility, which opened in 2006.⁷⁸ However, the team has instituted a wide variety of green-friendly practices at the stadium. A variety of green features such as energy-efficient lighting and low-flow flush toilets and faucets are used throughout the facility.⁷⁹

Busch Stadium also has an extensive recycling program, which diverted approximately 540 tons of recycling and 280 tons of yard waste from landfills during the program's two-year history. The facility's 550 recycling bins are augmented by the "Ice Mountain Green Team," which is a volunteer program that collects recyclables from fans at each Cardinals home game.⁸⁰

The Cardinals have also implemented a variety of green-related community and administrative programs. Team executives appear at a variety of green-related events throughout the calendar year.⁸¹ The team also staged several green events in 2010 including Green Week, an e-recycling event, and two "Bike to Busch" events.⁸² The Cardinals also offer "4 a Greener Game: The Ballpark Experience," which is a program for Boy Scouts and Girl Scouts.⁸³ The program teaches participants about eco-friendly practices and awards them a St. Louis Cardinals' participation patch upon completion.⁸⁴

Finally, the team has secured a series of thirteen green-related sponsor and advertising partners as part of its overall campaign.⁸⁵ Entities on this list include Anheuser Busch, Ameren UE, Energy Star, Ice Mountain, National Resources Defense Council, StLouisGreen.com, and Waste Management.⁸⁶

5. Philadelphia Eagles

Finally, the Philadelphia Eagles have been among the most aggressive sports organizations when it comes to adopting green business practices. While Lincoln Financial Field, the team's home stadium, is not LEED certified, the team has implemented a variety of eco-friendly operating

78. *4 a Greener Game*, STLCARDINALS.COM: COMMUNITY, <http://mlb.mlb.com/stl/community/green.jsp> (last visited Aug. 18, 2010).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

techniques at the facility, including a recycling program and installation of high-efficiency boilers.⁸⁷ The Eagles purchase enough renewable energy to cover the team's operations both at Lincoln Financial Field and its training facility, the NovaCare Complex.⁸⁸ The Eagles also require suppliers to discuss eco-friendly products as part of its bidding process and worked with its concessionaire to introduce new corn-based bio plastics flatware and dinnerware at the stadium.⁸⁹

In terms of the team's retail efforts, the Eagles market a variety of eco-friendly merchandise, including clothing, on their website.⁹⁰ The Eagles have also issued a series of eco-themed calendars, which feature the team's cheerleaders wearing eco-friendly attire and which are printed on recycled paper.⁹¹ Finally, the team also sells the "Eagles Forest Tree."⁹² For \$62, fans can have a tree planted in a 6.5-acre plot in a local state park and receive a card commemorating their purchase.⁹³ Trees planted in the forest are designed to serve as carbon offsets for the team's travel to away games.⁹⁴

One unique aspect of the Eagles' green efforts is that the organization's dedication to green also extends beyond the front office to its employees. The team reimburses employees who purchase renewable energy through local energy providers.⁹⁵ According to the team, at least 100 employees participated in the program.⁹⁶

This cursory review of the green efforts of five professional sports organizations considered by most to be at the forefront of the green sports movement reveals the problem that the sports attorney could face in this illustrative scenario. There is a clear lack of consistency and standards in sports with regard to green-related issues. LEED, Green Globes, and other similar certification systems are available to address many facility-based issues. But no comprehensive system currently exists to assess the

87. King, *supra* note 30.

88. 2008 Program Update, PHILADELPHIAEAGLES.COM, <http://www.philadelphiaeagles.com/gogreen/news.asp> (last visited Feb. 5, 2009).

89. King, *supra* note 30.

90. Philadelphia Eagles Go Green Products, *supra* note 23.

91. Philadelphia Eagles 2010-11 Cheerleader Calendar, PHILADELPHIAEAGLES.COM, http://store.philadelphiaeagles.com/Philadelphia-Eagles-2010=2011-Cheerleader-Calendar-_1814704195_pd.html (last visited Sept. 2, 2010).

92. Eagles Forest Tree, PHILADELPHIAEAGLES.COM, <http://store.philadelphiaeagles.com/store/item.aspx?ItemId=5201&FID=2006> (last visited Feb. 5, 2009).

93. *Id.*

94. Eagles Forest Tree, *supra* note 92.

95. 2008 Program Update, *supra* note 88.

96. King, *supra* note 30.

“greenness” of the entire sports organization. While this could change in the future, it does pose a representational risk for the sports attorney who has a client with the desire to run the greenest operation possible as posited in the illustrative scenario.

To that end, sports attorneys would have to be cognizant of this lack of green standards in the sports industry. They would most likely have to rely on the use of existing laws, codes, regulations, and certification systems to try and protect both their clients and themselves. Most importantly, they would have to commit to ongoing research and dialogue with their clients about current green issues, their effect on the client’s business, and the depth of the client’s commitment toward running a green operation.

B. Team Ownership

Once the defining of green has been addressed with the client, the sports attorney can move onto what might be perceived as more traditional forms of legal analysis. In our illustrative scenario, the client will be acquiring a professional sports franchise, which will require the attorney to set up a corporate entity for the team.

The process of selecting, setting up, and drafting the legal documents for a professional sports organization is likely one that has become routine for most sports attorneys. This effort likely includes utilization of a standard representational checklist as part of a discussion with the client about their basic financial, tax, and estate planning needs and desires. Combining the answers to these questions with a review of a league’s rules and constitution and a state’s corporate laws will then provide the best course of action for the attorney and the client. However, this is a practice area where the sports attorney needs to be aware of recent green-related developments.

In our illustrative scenario, the client asked to set up a corporate structure for the team and for that team to be a green operation. In the past, this might have led to the sports attorney recommending the implementation of a traditional corporate structure and suggesting that the client use green-themed marketing and promotions or to seek LEED certification for the team’s home facility as a way to achieve the “green” goal. In the future, it could mean setting up an entirely different type of corporate entity, as the implementation of green business practices has not been strictly related to facility development and operations.

Many individuals at the forefront of the green business movement felt restricted by existing corporate law as they pursued their societal goals. For example, Ben Cohen and Jerry Greenfield, the founders of Ben & Jerry’s Ice Cream, have stated their opinion on several occasions that existing corporate

governance law led the duo to sell their company to Unilever.⁹⁷ In 2000, the company received an offer from Unilever that was nearly twenty-five percent above the company's stock price.⁹⁸ The company's board of directors felt compelled to take the offer to prevent potential lawsuits from stockholders.⁹⁹ Greenfield later told *Bloomberg Business Week*, "The legal advice was that the primary concern for the directors was the financial interests of the shareholders."¹⁰⁰

As a result of the Ben & Jerry's situation and others like it, many green business experts have explored ways of incorporating green and social responsibility concepts into corporate governance law. When discussing the possible implementation of one of those concepts, the benefit corporation or "B Corp," Seventh Generation co-founder Jeffrey Hollender stated that the effort was "part of a larger transition to a more just, equitable, and sustainable economy. It's the beginning of creating institutions that support that transition."¹⁰¹ As of fall 2010, several different approaches to the issue are being pursued by green business advocates.

At the federal level, potential changes to the tax structure could lead to the development of a new corporate entity, which might allow for the consideration of green and other socially responsible actions to factor into corporate governance.¹⁰² In April 2010, Russell Sullivan, staff director for the Senate Finance Committee stated,

We might see the emergence of some proposals to establish what I'll call, for lack of a better term, a for-benefit corporation – something that is in between a private taxable company that's not under our rules of C corporations or S corporations and partnerships but also not under our rules having to do with charities¹⁰³

97. Dave Gram, *States Move to Let Firms Pursue Social Mission*, ABCNEWS.COM, <http://abcnews.go.com/print?id=10346054> (last visited Sept. 2, 2010).

98. *Id.*

99. *Id.*

100. John Tozzi, *New Legal Protections for Social Entrepreneurs*, BUSINESSWEEK.COM, Apr. 22, 2010, http://www.businessweek.com/smallbiz/content/apr2010/sb20100421_414362.htm.

101. *Id.*

102. Grant Williams, *Congress Could Consider Creating New Category of Organization, Expert Says*, THE CHRON. OF PHILANTHROPY, Apr. 15, 2010, <http://philanthropy.com/blogPost/Congress-Could-Consider/23134/>.

103. *Id.*

At the state level, a variety of approaches are being considered. Pending legislation in California would create the concept of the “flexible-purpose corporation,” which would allow companies to pursue socially responsible goals.¹⁰⁴ Susan MacCormac, the attorney who assisted in creating the model for the legislation, told *California Lawyer*, “A corporate board has a fiduciary duty to shareholders, and generally, what is seen as in the best interest of the company is maximizing profits This would allow what is in the best interest of a corporation to be broadly defined. It would give companies broader discretion.”¹⁰⁵

Perhaps the most notable effort to incorporate social responsibility into corporate governance law to date has been through the development of the aforementioned benefit corporation or “B Corp” concept. The B Corp concept was developed by B Lab, a 501(c)(3) organization comprised of various socially-focused business leaders and executives.¹⁰⁶ The group’s vision is “to create a new sector of the economy which uses the power of business to solve social and environmental problems.”¹⁰⁷ It hopes to achieve this goal by having its B Corp concept “legally recognized by the states, tax preferred by the IRS, and valued by employees, investors, and consumers.”¹⁰⁸

Much like the various certification systems in place to measure the eco-friendliness of facilities such as LEED, the B Corp concept creates a private, third party system designed to address a company’s impact on society. The process of becoming a B Corp is a four-step process.¹⁰⁹ First, the company must take a B Impact Assessment.¹¹⁰ Second, the company must complete a review with B Lab staff.¹¹¹ Third, the applicant must review the legal steps required of certified B Corps.¹¹² Fourth, the applicant signs a term sheet.¹¹³ Once certified, three additional requirements are triggered. The fifth step is

104. Bernice Yeung, *Profits with a Purpose*, CAL. LAWYER, July 2010, available at <http://www.callawyer.com/story.cfm?eid=910400&evid=1>.

105. *Id.*

106. *About B Corp – Who Certifies?*, B CORPORATION.NET, <http://www.bcorporation.net/index.cfm/fuseaction/content.page/nodeID/08c9dc4d-6064-48cb-af04-4fd9d4ced055/> (last visited Sept. 3, 2010).

107. *Why B Corps Matter*, B CORPORATION.NET, <http://www.bcorporation.net/why> (last visited Aug. 19, 2010).

108. *Id.*

109. *Become a B Corp*, B CORPORATION.NET, <http://www.bcorporation.net/become> (last visited Aug. 19, 2010).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

that a variety of supporting documentation must be submitted.¹¹⁴ Step six requires the company to amend its “corporate governing documents to include the B Corp Legal Framework.”¹¹⁵ Finally, the company must submit to random on-site audits.¹¹⁶ According to B Lab, twenty percent of B Corps will be audited every two years.¹¹⁷

As noted earlier, B Lab is also pursuing a course of action in which governmental bodies recognize the B Corp concept and provide financial incentives or legal recognition to companies that secure this status.¹¹⁸ As of fall 2010, the organization has achieved a solid modicum of success in these efforts.

In 2009, the City of Philadelphia passed an ordinance, which created the Sustainable Business Tax Credit.¹¹⁹ The ordinance provides a \$4,000 annual tax credit for the years 2012-2017 for companies that are certified as sustainable for the city’s Office of Sustainability.¹²⁰ Companies certified as B Corps or those certified by any other similar systems that might be developed can serve as *prima facie* evidence certifying sustainability for the purpose of the ordinance.¹²¹ The federal government and other municipalities are considering similar incentive programs.¹²²

The development, which is likely of greater importance to both socially responsible corporation advocates and sports attorneys representing league and ownership clients, is the adoption of benefit corporation statutes at the state level. In April 2010, Maryland became the first state to codify the concept by adopting it into law.¹²³ Vermont became the second state to do so in May 2010.¹²⁴ According to B Lab, six other states are considering similar legislation as of fall 2010.¹²⁵

The new Maryland law, which took effect on October 1, 2010, allows both new and existing corporations to become benefit corporations by following

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Why B Corps Matter*, *supra* note 107.

119. PHILA.CODE § 19-2604(10) (13) (2009). (2009).

120. *Id.*

121. *Id.*

122. *Public Policy*, B CORPORATION.NET, <http://www.bcorporation.net/publicpolicy> (last visited Aug. 19, 2010).

123. *Id.*

124. *Id.*

125. *Id.*

certain prescribed steps.¹²⁶ First, the company must elect to become a benefit corporation by amending or including in its charter a statement that it is a benefit corporation.¹²⁷ Second, clear reference to the fact that it is a benefit corporation must be made in the charter documents and stock of the company.¹²⁸ Third, the company must have the purpose of creating a general public benefit, which is defined by the law as, “[A] material, positive impact on society and the environment, as measured by a third-party standard, through activities that promote a combination of specific public benefits.”¹²⁹ The company may also identify specific public benefits it wishes to achieve but is not required to do so.¹³⁰ Potential activities mentioned in the law include providing individuals or communities with beneficial products or services; preserving the environment; improving human health; promoting the arts, sciences, or advancement of knowledge; or accomplishing any other particular benefit for the society or environment.¹³¹ The creation of the general public benefit and any of the specific public benefits must be in the best interests of the benefit corporation.¹³² Should it choose to do so, any officially designated benefit corporation under Maryland law can later terminate this designation by amending its charter to delete the benefit corporation reference and securing the approval of this action from its stockholders.¹³³

The Maryland law also imposes additional reporting requirements on the company. It is required to deliver an annual benefit report, which describes the ways in which the benefit corporation pursued the general public benefit, any specific public benefits it identified, and any circumstances that might have hindered the development of those pursuits.¹³⁴ A societal and environmental performance assessment that is prepared using a third-party standard is also required.¹³⁵ This benefit report must be issued within 120 days following the end of the company’s fiscal year.¹³⁶ It must also be made available to the public through the company’s website or upon request if the

126. MD. CODE ANN., CORPS. & ASS’NS § 5-6C (2010).

127. § 5-6C-03(A).

128. § 5-6C-05.

129. § 5-6C-06(A)(1).

130. § 5-6C-06(B)(1).

131. § 5-6C-01(D).

132. § 5-6C-06(C).

133. § 5-6C-04.

134. § 5-6C-08(A)(1).

135. § 5-6C-08(A)(2).

136. § 5-6C-08(B).

company does not have a website.¹³⁷

Perhaps the most noteworthy aspect of the Maryland law is illustrated in the director duties. Directors of benefit corporations are required to not only consider the effects of their actions on traditional constituencies such as stockholders, employees of the company and its subsidiaries, suppliers, and customers, but they are also take into account community and societal considerations along with the local and global environment.¹³⁸

The introduction of green concepts into corporate structure and governance is clearly a very fluid situation that will require the sports attorney's attention going forward. The sports attorney will have to follow developments on the state and federal levels to see if new corporate governance structures arise, which could be beneficial for green-minded clients. The potential growth of third-party models or certification systems such as the B Corp concept will need to be monitored. Finally, the potential to secure new financial and tax incentives for clients who choose these structures is another issue that will have to be followed.

But, these potential changes in the law do not operate in a vacuum. Sports attorneys representing league and ownership interests will also have to review league bylaws and constitutions to see if those bodies will allow socially-focused corporate structures to be utilized. Finally, and as is always the case, ongoing dialogue with the client will become even more essential for a couple of reasons. First, discussion will be necessary to find out if a client wishes to utilize a socially-focused corporate structure. For example, the client in our illustrative scenario might have exhibited a desire for a green operation that covered the facility and undertook some basic community-focused efforts. But, the prospective owner might not embrace a socially-focused corporate structure that necessitates additional ongoing reporting, increased corporate audits, and a corporate structure that could limit certain operational desires depending upon the structure of the laws that are eventually passed. Second, there could be any number of other external considerations such as tax planning, estate planning, or other similar considerations that could preclude the use of a socially-focused corporate governance strategy in some situations. As always, research, analysis, and client dialogue will be essential.

C. Facility Development & Operations

The next issue to address in our illustrative scenario is the facility-related issues. The sports attorney has typically had four areas to address with clients

137. § 5-6C-08(C).

138. § 5-6C-07.

in this area: design and construction, financing, leasing, and operations. All of these areas are interrelated and often require the sports attorney to work with a variety of professionals to achieve the best outcome for the client. Some areas such as financing and leasing have traditionally been more in the sports attorney's domain with design and operations typically being minor issues of concern.

However, the increasing adoption of green by the sports industry has only created more issues for the sports attorney in this regard. The developing requirements of green and their potential impact on clients will require that the sports attorney know more about facility development and operation processes than ever before.

1. Design & Construction

Sports attorneys historically have been tangentially involved with the facility design and construction processes. Their involvement has typically revolved around traditional attorney tasks such as land acquisition negotiations and document drafting, along with negotiating contracts with professionals such as architects, engineers, and construction firms, or negotiating agreements with construction material suppliers. The sports attorney might have been aware of, but often not directly involved in, other development related issues such as the decision-making process for issues such as site selection.

a. Building Codes and Mandates

The most obvious area of focus for the sports attorney with regard to facility design and construction would be the development of new green building code requirements and governmental building mandates. This is an issue that is typically the bailiwick of architects, but it also is an issue that attorneys need to stay aware of. Most of these new governmental requirements are rather straightforward and will not be difficult for the sports attorney to address. However, they do add more items on the representational checklist that need to be covered both with the client and the other professionals working on the project. Failure to do so early in the process could lead to mistakes that are incredibly costly or impossible to fix, thus putting the sports attorney and the project at risk.

To date, most building codes and mandates revolving around green concepts have tended to fall into one of three categories. From the sports attorney's perspective, a review should be done of the provisions in all three categories to determine what the project requires. It should also be noted that many states and municipalities have preferences and goals in place for the use

of these green building techniques but do not require them. Others might have a mandate in place that can be eliminated if there would be a substantial negative effect on the project's bottom line. As such, it is incumbent upon the sports attorney to review the provisions in question to determine what must be done on the project.

The first category covers the imposition of energy-related practices. A substantial portion of these regulations have focused on the development of public buildings, which could have an effect on the development of new sports facilities, many of which are owned by the public sector. Potential regulations in this category include imposing energy efficiency standards for buildings, mandating the use of energy-efficient equipment, mandating renewable energy, and addressing land-use issues surrounding renewable energy.¹³⁹ For example, the State of Minnesota requires that new state buildings must generate at least two percent of the project's energy needs from onsite wind and sun energy sources.¹⁴⁰ However, the project can be exempted from this requirement if a pre-design cost and price analysis states an explicit reason for the exemption.¹⁴¹

The second category deals with the third-party certification of the eco-friendly status of facilities. These mandates often specifically require securing LEED status in order to satisfy the requirements.¹⁴² However, it is important for the sports attorney to review each law carefully as other certifications systems such as Green Globes or alternative means of satisfying the certification mandate may be allowed. For example, Illinois and New Jersey allow projects to utilize LEED, Green Globes, or similar rating systems to satisfy this requirement.¹⁴³ The Illinois law also mandates the inclusion of "at least one LEED alternative transportation criterion for public transportation or bicycle access" regardless of the certification system that is utilized.¹⁴⁴ The State of Minnesota is working toward the implementation of Sustainable Building 2030 standards and funding research at the Center for Sustainable Building Research at the University of Minnesota as part of this effort.¹⁴⁵

The final category of green-related codes addresses a variety of construction-related requirements. These types of regulations can mandate the recycling of materials used on a project or the use of local materials. For

139. *DSIRE: Rules, Regulations & Policies for Energy Efficiency*, *supra* note 8.

140. MINN. STAT. § 16B.32(1a) (2009).

141. *Id.*

142. ILL. PUB. ACT 096-0073 (2009); N.J. STAT. § 52:32-5.3 (2010).

143. ILL. PUB. ACT 096-0073; N.J. STAT. § 52:32-5.3.

144. ILL. PUB. ACT 096-0073.

145. MINN. STAT. § 216B.241(9) (2009).

example, an executive order issued by the governor in the State of Indiana states that “Indiana hardwood lumber, further, should be considered in all projects, where practicable, as a local source material” for state building projects.¹⁴⁶ In January 2010, the State of California mandated the diversion of fifty percent of construction waste from landfills on construction projects as part of its new CALGREEN building code.¹⁴⁷

The efforts at creating green building codes to date have been completed in a piecemeal fashion. They have been passed at various levels of government including states, counties, and municipalities. Some jurisdictions have passed stringent laws, while others have not even addressed the subject. This inconsistency can make it challenging for the sports attorney, industry professionals, and clients to determine what needs to be done to achieve green objectives.

As a result of these inconsistencies, a variety of entities have begun efforts toward creating standardized systems that can be adopted by municipalities across the country. In January 2010, the State of California passed the nation’s first mandatory green building standards code known as CALGREEN.¹⁴⁸ Highlights of the new law include requirements that new buildings constructed in California reduce water consumption by 20%, utilize low pollutant-emitting materials, use moisture-sensing irrigation systems, and requires mandatory inspection of energy systems for nonresidential buildings over 10,000 square feet.¹⁴⁹

In March 2010, a consortium of groups, including the International Code Council, the American Society of Heating, Refrigerating and Air Conditioning Engineers, the U.S. Green Building Council, and the Illuminating Engineering Society of North America, launched the International Green Construction Code (IGCC).¹⁵⁰ According to the parties, the IGCC is a “comprehensive model green building code designed to rapidly advance green building practice across the U.S.”¹⁵¹ International Code Council Chief Executive Officer Richard P. Weiland stated, “The IGCC provides a vehicle for jurisdictions to

146. Ind. Exec. Order No. 08-14 (2008), available at <http://www.in.gov/legislative/iac/20080709-IR-GOV080541EOA.xml.pdf>.

147. *Governor Schwarzenegger Announces First-in-the-Nation Statewide Green Building Standards Code*, GOV.CA.GOV, Jan. 12, 2010, <http://gov.ca.gov/index.php?/print-version/press-release/14186/>.

148. *Id.*

149. *Id.*

150. ICC, ASHRAE, USGBC and IES Announce Nation’s First Set of Model Codes and Standards for Green Building in the U.S., USGBC.ORG, Mar. 11, 2010, <http://www.usgbc.org/Docs/News/CodesRelease.pdf>.

151. *Id.*

regulate green for the design and performance of new and renovated buildings in a manner that is integrated with existing codes as an overlay, allowing all new buildings to reap the rewards of improved design and construction practices.”¹⁵² An important item to note is that the parties anticipate that the IGCC will be a flexible document that is updated on an ongoing basis.¹⁵³ The second version of the IGCC is scheduled for a fall 2010 release with a third version planned for 2012.¹⁵⁴

While a great deal of attention has necessarily been focused on the development of new green-related building requirements, it is equally important for the sports attorney to understand how existing codes and regulations can affect the client and the project as well. It is easy to envision a scenario in which the efforts to satisfy a mandate or client preference for a green operation could cause a project to run afoul of other laws or regulations. For example, technological advances are making it possible to install renewable energy generation units such as solar, wind, or biomass power in more locations than ever before. It is entirely possible that the various professionals working with the client in our illustrative scenario might recommend the installation of solar panels, solar film, or small wind turbines on the roof of the stadium or arena as a way to satisfy both green governmental mandates and the client’s desire to run a green operation. While this may be the best method of meeting the green requirements or desires, it could cause other legal issues for the project by violating zoning or other similar ordinances. As such, it might be necessary for the sports attorney to coordinate these efforts for the benefit of the client.

b. Facility Certification Systems

The next issue for the sports attorney to consider in the facility area is third-party certification systems that attest to the eco-friendly status of a facility. Certification systems such as the aforementioned LEED and Green Globes have become a popular way to show the “greenness” of a stadium or arena. And as noted in the previous section, securing this certification can be required in some situations.

Perhaps the best-known green facility certification system utilized in the United States is Leadership in Environmental Engineering and Design (LEED), which is administered by the United States Green Building Council

152. *Id.*

153. Adam Figman, *International Green Construction Code Sets Course for Sustainable Future*, USGBC.ORG, Mar. 16, 2010, <http://www.usgbc.org/News/USGBCInTheNewsDetails.aspx?ID=4341>.

154. *Id.*

(USGBC).¹⁵⁵ Originally developed in 2000, LEED uses a point-based rating system to award one of four potential certification designations (Certified, Silver, Gold, and Platinum) to a facility.¹⁵⁶ Different certification systems are used for various types of projects. For example, new construction projects use a different system than that utilized by existing buildings.¹⁵⁷ Points are awarded to a project based upon satisfying criteria in seven different green building categories, including water efficiency, use of construction materials, site selection issues, and use of onsite renewable energy among others.¹⁵⁸ The USGBC frequently updates the LEED system and issues a variety of educational materials to assist professionals in understanding and implementing the system.¹⁵⁹ The current version of LEED, Version 3, was launched in April 2009.¹⁶⁰

As of fall 2010, sports facility projects do not have their own set of certification criteria, although talk of developing such a system has occurred in the past.¹⁶¹ Noteworthy LEED milestones in the sports industry include the first sports project certified with LEED status, which was the Detroit Lions' practice facility, located in Allen Park, Michigan.¹⁶² Medlar Field at Lubrano Park, the home of the New York-Penn League State College Spikes and Penn State Baseball, was the first professional stadium to secure LEED certification.¹⁶³ Nationals Park, home of Major League Baseball's (MLB) Washington Nationals, was the first major league stadium to secure LEED certification.¹⁶⁴ As of fall 2010, Target Field, the home of MLB's Minnesota Twins, is the major league stadium with the highest LEED point total secured to date with a thirty-six total.¹⁶⁵ Finally, the CONSOL Energy Center, the new home of the National Hockey League's Pittsburgh Penguins, is currently

155. *LEED Green Building Certification System Frequently Asked Questions*, USGBC.ORG, <http://www.usgbc.org/ShowFile.aspx?DocumentID=3330> (last visited Aug. 26, 2010).

156. *Id.*

157. *Id.*

158. *Id.*

159. *LEED Version 3*, USGBC.ORG, <http://www.usgbc.org/DisplayPage.aspx?CMSPageID=1970> (last visited Oct. 26, 2010).

160. *Id.*

161. Brian Libby, *Green Monsters*, SUSTAINABLEINDUSTRIES.COM, Sept. 28, 2007, <http://sustainableindustries.com/articles/2007/09/green-monsters>.

162. *Id.*

163. *Id.*

164. *Nationals Park Facts and Figures*, *supra* note 73.

165. *Twins' Target Field Gets Highest LEED Rating of any Ballpark in America*, MLB.COM, Apr. 8, 2010, http://mlb.mlb.com/news/print.jsp?ymd=20100408&content_id=9141798&vkey=news_mlb&fext=.jsp&c_id=mlb.

the major league arena with the highest LEED certification (Gold) and points (forty-two).¹⁶⁶

While LEED is a popular certification system utilized by many sports projects around the country, it is important for the sports attorney to note that there are a variety of facility certification systems that exist around the world, with others being developed annually. Systems such as Green Globes, BREEAM, CASBEE, and Green Star are utilized for certification of projects around the world.¹⁶⁷

As discussed in the previous section, Green Globes is a Canadian-developed, point-based facility certification system that can satisfy green building certification mandates in some situations.¹⁶⁸ Development of Green Globes concepts started in 1996 by the Canadian Standards Association and eventually launched under the Green Globes name in 2000.¹⁶⁹ In the United States, the Green Globes system is owned and implemented by the Green Building Initiative, which was named the first green building organization to be accredited as a standards developer by the American National Standards Institute in 2005.¹⁷⁰ Like LEED, Green Globes-certified projects receive different certification levels with a one-globe through four-globe designation being possible.¹⁷¹ And again, new construction projects and existing facilities also have completely different certification systems under Green Globes.¹⁷²

There are several key issues for the sports attorney to keep in mind with regard to the facility certification issue. First, the sports attorney needs to understand the certification needs of the project. A determination should be made as soon as possible as to whether project certification is mandated by law, lease, or financing requirements. If not mandated by outside factors, the sports attorney needs to determine the client's desire to pursue certification. For example, the client in our illustrative scenario mandated the greenest

166. *CONSOL Energy Center is First NHL Arena to Achieve LEED Gold Certification*, *supra* note 46.

167. *About Green Star New Zealand*, NZGBC.ORG, <http://www.nzgbc.org.nz/main/greenstar/elaboration/about> (last visited Nov. 1, 2010); *An Overview of CASBEE*, IBEC.ORG.JP, <http://www.ibec.or.jp/CASBEE/english/overviewE.htm> (last visited Nov. 1, 2010); *What is BREEAM*, BREEAM.ORG, <http://www.breeam.org/page.jsp?id=66> (last visited Nov. 1, 2010); *What is Green Globes?*, GREENGLOBES.COM, <http://www.greenglobes.com/about.asp> (last visited Oct. 26, 2010).

168. *What is Green Globes?*, *supra* note 167.

169. *Id.*

170. *Id.*

171. *Green Globes Frequently Asked Questions*, GREENGLOBES.COM, <http://www.greenglobes.com/about-faq.asp> (last visited Aug. 26, 2010).

172. *The Practical Building Rating System*, GREENGLOBES.COM, <http://www.greenglobes.com/default.asp> (last visited Aug. 26, 2010).

operation possible. The sports attorney would have to find out if this included securing third-party facility certification. An important item to note is that this decision-making process now requires the sports attorney to understand more about the business end of the potential stadium or arena project at an earlier stage of development than ever before in order to provide beneficial advice to the client. Issues such as site selection and transportation issues are important point-earning criteria in virtually every third-party facility certification process. They are also issues that obviously cannot easily be changed or rectified once financing documents are signed and concrete starts to pour.

The second issue for the sports attorney to consider in this area is what type of certification should be pursued. As noted earlier, there are a variety of systems with more being developed each year. Each certification system has its own requirements and related costs associated with it. The sports attorney will likely have to work with the client and the various project professionals to make the determination as to what is best for the project.

Finally, from a preparation standpoint, the sports attorney should consider learning as much as possible about the various facility certification systems available in the industry. In fact, Brian D. Anderson, a Wisconsin-based attorney with a practice dealing with green building issues, suggested attorneys consider securing LEED accreditation, stating in *Wisconsin Lawyer* magazine that “an attorney versed in the legal risks, benefits, procedures, and tax consequences involved with constructing a green building or having it LEED certified can deliver valuable advice to a client.”¹⁷³ Attorney Anderson went on to state, “One way for attorneys to gain LEED expertise is the USGBC professional accreditation program. The USGBC offers a series of classroom and Internet-based classes that culminate in the professional accreditation exam. People who pass the exam are awarded the accreditation.”¹⁷⁴ The Green Globes system offers a similar process.¹⁷⁵ While securing green building certification accreditation status may seem to be a substantial commitment, it could prove beneficial for the sports attorney in a couple of ways. First, it can assist the attorney in interacting with fellow professionals working on the project, such as architects and equipment suppliers. Second, it can help sports attorneys as they analyze and explain issues to the client throughout the certification-documentation process.

173. Anderson, *supra* note 51.

174. *Id.*

175. *Green Globes Personnel Certification: The Green Building Initiative*, GBI.ORG, <http://www.thegbi.org/green-globes/personnel-certifications/default.asp> (last visited Aug. 26, 2010).

c. *Professional Relationship Management*

The third item for the sports attorney to consider in this area is the contractual relationships that exist between the client and the various professionals engaged in the development of the stadium or arena project. As seen throughout this article, the decisions and actions taken by architects, engineering firms, construction firms, landscapers, concessionaires, and other similar service providers can have a substantial impact on a sports facility project. One misstep can easily cost millions of dollars through repair costs or lost financing opportunities. While these relationships have always been issues for the sports attorney to consider on stadium and arena projects, the introduction of green practices creates another issue that must be addressed.

In an effort to protect clients to the greatest extent possible from such problems, Michael R. Christopher, a Wisconsin-based attorney with a practice focused on green building, advocates using a system of contractual provisions, warranties, insurance, and bonds in an effort to protect the client.¹⁷⁶ Attorney Christopher stated in *Wisconsin Lawyer* magazine, "It is important for lawyers to be familiar with the way that contracts, insurance, and bonds interact in the green construction process."¹⁷⁷

2. Facility Financing

Facility development plans and financing have become more intertwined with each passing year. Site selection, facility size, and operational features are heavily dependent upon the ability to pay for them, meaning it is not unusual for the sports attorney to evaluate these items in concert when representing a client. As such, it should not be a challenge for most sports attorneys to add on a "green layer" to their existing representational planning for the client in the area of facility financing. When adding on this green layer, they will discover that this development creates both challenges and opportunities for the client and the eventual success of the stadium or arena project.

a. *Mandates & Requirements*

The sports attorney representing teams and leagues is likely to face the development of new green-related mandates imposed by the public sector in

176. Michael R. Christopher, *Green Development Opportunities and Risks*, 82 WIS. LAWYER 6, June 2009, available at <http://www.wisbar.org/AM/Template.cfm?Section=LegalCommunityNews&CONTENTID=81568&TEMPLATE=/CM/ContentDisplay.cfm>.

177. *Id.*

order for the project to receive funding. For example, the financing plan for Target Field required the Minnesota Ballpark Authority and the team to pursue LEED certification if the parties deemed it to be economically feasible.¹⁷⁸ The authority later put \$1 million toward these efforts with the team paying the remaining \$1.5 million.¹⁷⁹ The funding went to heating and ventilation systems, carpeting, paints, bike racks, and technology designed to reduce energy and water use.¹⁸⁰ The facility secured LEED Silver certification upon opening in 2010 and was the MLB stadium with the highest LEED score to date as of fall 2010.¹⁸¹

In light of the growing use of green, it is likely that the industry will see more of these provisions in sports-facility financing plans in the future. Such clauses could require the team to pursue green construction, pursue third-party certification, or make a contribution to the project in order to cover costs associated with these efforts, as seen in Minnesota. New stadium and arena lease provisions could include mandating cooperation of all parties toward seeking third-party certification along with the pursuit of grants or other financing mechanisms, which could reduce the overall cost of the green initiatives.

b. Incentive Programs

While sports attorneys need to be aware of the potential financial risks created by green mandates in stadium and arena financing plans, they should also be cognizant of the potential benefits created by a variety of funding mechanisms that are designed to encourage the use of green construction and operational practices. These financial incentives are offered by various levels of government along with private sector entities such as energy companies and foundations.

The types of financial incentives available that could, under the right circumstances, assist in funding the green elements of a sports-facility financing plan include grants, low-interest loans, bonds, sales tax exemptions, tax rebates, property tax credits, and corporate tax credits.¹⁸² As of August 2010, approximately 1,000 different rebates related to energy efficiency and

178. *Twins, Ballpark Authority to Spend \$2.5M on "Green" Features*, BALLPARKWATCH.COM, <http://www.ballparkwatch.com/> (last visited Jan. 3, 2008).

179. John Vomhof, Jr., *Twins, Park Authority to Spend \$2.5M on LEED Design Efforts*, MINNEAPOLIS ST. PAUL BUS. J., Dec. 30, 2007, <http://www.bizjournals.com/twincities/stories/2007/12/31/story4.html>.

180. *Id.*

181. *Twins' Target Field Gets Highest LEED Rating of any Ballpark in America*, *supra* note 165.

182. *See DSIRE: Financial Incentives for Energy Efficiency*, *supra* note 7.

approximately 400 rebates related to renewable energy were listed as being available from various public and private sources in the Database of State Incentive for Renewables & Efficiency (DSIRE).¹⁸³ To be sure, most sports organizations and facilities would be lucky to qualify for a very small fraction of these incentives due to geographic restrictions and other similar factors. However, these numbers illustrate the potential that exists for the sports facility projects to benefit financially from the inclusion of green business practices.

The potential representational issues created by financial incentives should not be difficult for sports attorneys to manage. But, from a professional responsibility perspective, they do need to be aware of them. First, the sports attorney needs to know about the various incentives that might be available for the client. There are a variety of resources available on the Internet that address this issue. The aforementioned DSIRE database maintained by North Carolina State University is among the best known in this regard.¹⁸⁴ Second, these financial incentives often have time restrictions, such as fiscal years, in place. As such, the sports attorney needs to work with the client and fellow professionals to be ready to move quickly on opportunities as they arise. Third, the sports attorney will have to work with the client and fellow professionals to analyze the various incentives that are available from a cost/benefit perspective to determine which course of action to recommend to the client. For example, small incentives might not be cost-effective to pursue. Or, some incentive plans might be in conflict, making it necessary to choose one over the other. Finally, the sports attorney could need to coordinate the completion of all required documentation needed to secure the financial incentives. This could include submission of the original documentation along with subsequent reporting on a recurring basis.

3. Facility Leases

The issue of negotiating the facility lease is another issue that is directly tied to both the development and successful operation of the stadium or arena. From a representational and preparational perspective, it is likely that little will change for the sports attorney in this area because of the increasing adoption of green by the sports industry. However, there are three items that the sports attorney should consider when in the midst of stadium and arena lease negotiations, document review, drafting, or both.

183. *Id.*

184. *About DSIRE*, DSIREUSA.ORG, <http://www.dsireusa.org/about/index.cfm?&printable=1> (last visited Aug. 23, 2010).

First, as noted earlier, the sports attorney should review any state and local regulations, codes, or mandates that could have an effect on the lease and subsequent operation of the facility. Implementing recycling programs, fulfilling energy efficiency mandates, and securing or maintaining third-party certification are among the most likely requirements in this area. As was the case with the client in our illustrative scenario, the sports attorney should also be aware of any definitional issues that might arise around green-related concepts found in the lease document.

Second, the sports attorney should work with the client, organization executives, and other professionals to determine the overall financial effect of any mandated green facility efforts found in the lease document. The negotiation of a sports-facility lease affects both the legal and financial aspects of a sports organization. Studying the overall financial effect of the green requirements in the lease can put the attorney and the client in position to strike the best deal for their side. To that end, in some instances, if an organization knows it is going to undertake certain green efforts, it might be beneficial from a financial and public relations position to also put those efforts into the documented deal.

Finally, the development of new green technologies and equipment is likely to continue throughout the term of the agreement. New generations of facility equipment such as fryers, coolers, recycling equipment, facility management software, playing surface preparation devices, and scoreboards are likely to be incrementally more energy-efficient as time moves forward. The installation of this equipment will likely come at great cost to the facility and potentially the client.

In light of the likely ongoing development of new green equipment, sports attorneys representing teams might wish to pursue lease language that requires the facility owner to commit to the installation and payment for any new green technologies that are developed for the industry throughout the term of the lease. For example, the provision could revolve around a trigger provision, which activates once certain conditions are met such as the usage of the potential green improvement at over fifty percent of the particular league's facilities. Several NFL teams already have similarly structured provisions in their leases that relate to a variety of capital improvement items.¹⁸⁵ In light of the potential social and financial benefits of installing these new green technologies, it is possible that these clauses would be acceptable to a large portion of the general public. The provision could also contain a requirement

185. See Kristen E. Knauf, Comment, *If You Build It, Will They Stay? An Examination of State-of-the-Art Clauses in NFL Stadium Leases*, 20 MARQ. SPORTS L. J. 479 (2010) (discussing these types of lease provisions).

that the parties work together to secure grants and other financial incentives to mitigate the cost to the facility owner.

4. Facility Operations

In many situations, the sports attorney's work for a client does not end once the facility has been constructed. Upon opening, a sports facility often has to be operated for administrative work, daily operations, and the staging of hundreds of large-scale public events annually. Depending upon the type of facility operated by the client, millions of people could come through the turnstiles every year.

As one might suspect, the role of the attorney in these situations is highly dependent upon the needs of the client. However, the sports attorney should be aware of two major issues when working with the client on operations-based issues.

a. Existing Operations

The first issue the sports attorney should address is working with the client and their staff to ensure that any existing legal obligations with regard to green-related issues are being satisfied. Satisfying this objective can encompass a variety of tasks.

The first task the sports attorney needs to address is drafting and reviewing contracts with various partners and suppliers to ensure those providers satisfy the overarching green needs and requirements of the client. Contracts with concessionaires, caterers, waste removal companies, energy suppliers, landscapers, and ticket companies are just a few of the agreements that could fall into this category. Second, the sports attorney should work with the client to ensure that green-related commitments made by the client to satisfy the lease, laws, grants, or other legal commitments are being met. For example, the development and ongoing commitment to recycling and energy efficiency programs at the facility could be critical to avoid potential liability for the client. Similarly, the sports attorney can work with the client and staff if necessary to ensure that the documentation required for the financing, the facility lease, or the maintenance of third-party eco-friendly certification is being developed and submitted in a timely fashion.

The key for the sports attorney in this area is to be aware of developments taking place in the industry and with the client that could have an effect on the client. To be sure, this is nothing new for an experienced attorney used to representing sports clients. However, the development of green has made it incumbent upon the sports attorney from a professional responsibility perspective to study green issues and convey this knowledge to the client.

Unfortunately for the sports attorney, this process can be trickier than it initially appears. For example, the client in our illustrative scenario committed to running a green operation. It is possible that this was made into a commitment with the municipal facility owner through a stadium or arena lease provision stating that the “lessor warrants that they will run the facility in a socially responsible manner throughout the term of this lease and pursue eco-friendly operating techniques whenever reasonably possible to do so.” The sports attorney could have to make a recommendation to the client as to whether this lease language might require the team to utilize corn-based cups and flatware for concession items. If yes, a second review might be necessary to determine if imposing such a requirement could cause potential issues under the existing concessionaire agreement.

b. Capital Maintenance and Facility Upgrades

If properly planned for and constructed, sports facilities should enjoy a long-term operational lifespan. This makes it likely that replacing operational equipment such as fryers, refrigeration coolers, lighting, field maintenance equipment, and other similar items will become necessary throughout the lifetime of the facility and the lease. The acquisition of new eco-friendly equipment can also enhance the client’s operation. As such, this is another area that the sports attorney needs to be aware of and ready to address with the client.

Examples of this approach to date in the sports industry have been quite varied and show the potential opportunities for the client that the sports attorney should be prepared for. For example, in 2009, the St. Louis Cardinals secured a grant to purchase and install a cardboard compactor and recycling containers at Busch Stadium.¹⁸⁶ The team is now pursuing additional grants to fund the acquisition of electric hand dryers, composting equipment, and tilt trucks.¹⁸⁷

As discussed earlier, a wide variety of financial incentives such as grants, tax incentives, and tax abatements exist that can assist the client in securing these upgrades at reduced or no cost to the operation.¹⁸⁸ And again, the sports attorney could also consider negotiating these upgrades into the facility lease, financing documents, or maintenance funding plans.

186. *St. Louis Cardinals – Go Green*, STLCARDINALS.COM, <http://cardinals.mlb.com/stl/community/green.jsp> (last visited Aug. 18, 2010).

187. *Id.*

188. See *DSIRE: Financial Incentives for Energy Efficiency*, *supra* note 7.

D. Marketing & Promotions

The client in our illustrative scenario expressed a desire to run a green operation. This makes it likely that the team will engage in a variety of green-related customer and partner initiatives. As was the case with other issues, this can pose representational challenges that sports attorneys will need to be aware of and address with the client in order to satisfy their professional responsibility requirements.

The first items to consider in this area are green-themed merchandise and giveaways. Anticipating consumer demand, teams have been very aggressive in developing these opportunities. Merchandise sold to date includes organic clothing, water bottles, reusable shopping bags, calendars printed on recycled paper, and trees in a state forest.¹⁸⁹ Giveaway items have included green baseballs, baseball caps made from recycled plastic bottles, game-worn hemp uniforms, energy conservation kits, LED night-lights, energy efficient washers and dryers, magnets with recycling tips, tree saplings, CFL light bulbs, and reusable shopping bags.¹⁹⁰ Some organizations have also granted ticket discounts to individuals who completed certain eco-friendly practices while others have offered free or discounted parking to customers driving hybrid vehicles.¹⁹¹

From a representational perspective, the sports attorney is likely to review these merchandise offerings and giveaways with the same legal concerns as seen for general merchandise or giveaways. Safety concerns and definitional eligibility requirements would likely be two items of concern in this area. The sports attorney should also be aware of the potential for greenwashing complaints, negative media coverage, and potential litigation.

The next issue to consider is the implementation of green-themed

189. *Bucks Go Green*, NBA.COM, http://www.nba.com/bucks/gogreen_bucks.html (last visited Apr. 3, 2009); *Astros Play Green*, *supra* note 66; *Philadelphia Eagles Go Green Products*, *supra* note 23.

190. *Astros Go Green*, *supra* note 66; *Blue & Gold Makes Green*, *supra* note 16; Hill, *supra* note 16; *MeadWestvaco Earth Day Green Baseballs Have Arrived*, BMETS.COM, <http://www.bmets.com/viewarticle.asp?a=1333> (last visited Feb. 3, 2009); *Moose Encourage Fans to Go Green Next Friday*, MOOSEHOCKEY.COM, Nov. 7, 2008, <http://www.moosehockey.com/mooseneews/407/>; Newman, *supra* note 17; *Several MLB Teams Celebrating Earth Day with Green Initiatives*, SPORTS BUS. DAILY, Apr. 22, 2009, available at <http://www.sportsbusinessdaily.com/index.cfm?fuseaction=archive.printArticle&articleID=129576>; *Top 10 Team Initiatives*, NBA.COM, <http://www.nba.com/green/top10.html> (last visited Apr. 9, 2010).

191. *Weekly Promotions*, THESHOREBIRDS.COM, <http://theshorebirds.com/ismmedia.com/ISM3/std-content/repos/Top/2008%20Content/200> (last visited Apr. 28, 2008); Dave Fultz, *Brewers to Stage Environmental Promo*, BREWERS.COM, http://milwaukee.brewers.mlb.com/content/printer_friendly/mil/y2008/m06/d02/c2824183.jsp (last visited June 4, 2008).

promotions. These efforts have taken on a variety of attributes to date. Many organizations have implemented the concept of carbon-neutral games by purchasing carbon offsets from a variety of industry suppliers.¹⁹² The goal of such efforts is usually to acquire enough offsets to negate the impact of the event, including team and fan travel.¹⁹³ Other organizations have instituted green days or weekends that focus on educational programs and utilize green-themed in-game activities.¹⁹⁴ A more traditional promotion changed to utilize the green-theme is the staging of green fireworks.¹⁹⁵ Green fireworks do not refer to the color of the display but instead are those deemed to be more earth-friendly than their regular counterpart.¹⁹⁶ As was the case with merchandise and giveaways, the potential for litigation related to greenwashing, negative publicity, and litigation would likely be the main areas of concern.

Many teams and facilities have begun to create and tout rosters of green-friendly sponsors, partners, and advertisers. For example, Philips Arena lists several green partners on its website including Coca-Cola, Home Depot, Philips, and Arrow Exterminators.¹⁹⁷ In 2010, the Midwest League's Bowling Green Hot Rods struck a deal with Service One Credit Union to create the "Service One Credit Union Green Seats" section.¹⁹⁸ According to the team's press release announcing the deal, the agreement "represents a tangible connection between the Hot Rods' and Service One Credit Union's respective green initiatives."¹⁹⁹ Again, for the sports attorney, the main representational concern in this area would likely revolve around greenwashing accusations, negative publicity, and litigation.

Finally, sports organizations have also developed a wide variety of green-themed community relations programs. In-facility efforts include creating volunteer recycling teams and staging e-recycling days.²⁰⁰ External service efforts include using staff and players to plant trees, clean up neighborhoods,

192. *Seattle Mariners Go Carbon Neutral on Earth Day*, *supra* note 20.

193. *Eagles Forest Tree*, *supra* note 92.

194. *Major League Baseball Clubs Celebrate 40th Anniversary of Earth Day*, *supra* note 18.

195. Hill, *supra* note 16.

196. *The Next Generation of Fireworks May All Be Green*, GREENBIZ.COM, July 2, 2009, <http://www.greenbiz.com/print/26170>.

197. *Philips Arena Green Week*, PHILIPSARENA.COM, <http://philipsarena.com/Content/view.aspx?CID=c4f69e2a-669a-44d2-a075-f72131737fd1> (last visited Apr. 12, 2010).

198. *Service One Credit Union Brings "Green" to Bowling Green Ballpark*, MINORLEAGUEBASEBALL.COM, Feb. 18, 2010, http://www.minorleaguebaseball.com/news/article.jsp?ymd=20100218&content_id=8093884&vkey=news_t2498&fext=.jsp&sid=t2498.

199. *Id.*

200. *Major League Baseball Clubs Celebrate 40th Anniversary of Earth Day*, *supra* note 18.

or build green homes for Habitat for Humanity.²⁰¹ Education-based projects include creating honorary programs that highlight students and community members who focus on green initiatives and developing school programs.²⁰² These efforts can raise a different set of issues for the sports attorney than the other green initiatives discussed in this section. The use of staff and players can create potential liability and workers compensation issues that the organization should be prepared for. The use of volunteers to collect recyclable materials can also create potential legal issues. To that end, the St. Louis Cardinals require volunteers to sign a waiver before serving on their Ice Mountain Green Team.²⁰³

The implementation of various green-themed promotions, marketing efforts, and merchandise sales does not appear to be an area of huge operational risk for the client. The main concern appears to be the standard levels of risk normally associated with the implementation of general marketing, merchandise, and sponsorship-related efforts on an ongoing basis. However, the sports attorney should be aware of the fact that adding the green element to these activities does create the potential for greenwashing accusations, which could lead to negative publicity and potential litigation.

CONCLUSION

The use of green practices has seen explosive growth in American society over the past decade. Although the pace and type of impact that green will have going forward remains open for discussion, the potential benefits for consumers and businesses make it likely that this general overall trend toward the acceptance of green practices will continue.

The same argument can be made for green's impact on the sports industry as well. In fact, it could be argued that the sports industry might really be at the front end of the cycle in terms of potential impact. The sports-facility building cycle is likely to lead to the development of a substantial number of new stadiums and arenas over the next two decades. And, it is likely that these new facilities will embrace new green-friendly strategies in terms of financing, architecture, and operations. It is also possible that these new facilities will be capable of generating their own power and sending it back to the power grid on non-game days. If this occurs, leases, financing documents, and general

201. *Astros Play Green*, *supra* note 66.

202. *National Fuel & Buffalo Sabres Partner to Form a New Team of Energy Detectives*, SABRES.NHL.COM, <http://sabres.nhl.com/team/app?service=page&page=NewsPage&articleid=394334> (last visited Feb. 5, 2009); *BULLS: Go Green – Chicago Bulls Environmental Program*, NBA.COM/BULLS, http://www.nba.com/bulls/community/go_green.html (last visited Sept. 2, 2010).

203. *St. Louis Cardinals – Go Green*, *supra* note 186.

business planning would have to account for this development. For the teams that do not secure new facilities, renovations or retrofits using new energy-efficient lighting and appliances that pay for themselves over time are a strong possibility. Recent and future developments in corporate governance law may also allow future owners with a desire to run a socially-focused operation like Jeff & Christina Lurie or Drayton McLane use new green-focused corporate structures to run their operations. Finally, new revenue generation opportunities with a green focus such as promotions, giveaways, merchandise, and sponsorships are being developed every year and this trend is also likely to continue going forward. Simply stated, the future looks limitless for the connection between the green and sports industries.

These developments will create a series of new, exciting representational issues for the sports attorney. Again, these challenges will not be difficult for most sports attorneys to manage. For many, these developments will simply require adding a “green layer” on top of their existing tried and true representational approaches. However, this will necessitate additional research and analysis, two touchstones of all good attorneys. Regardless of what happens in the connection between green and sports, it is incumbent upon the sports attorney know green in order to represent their clients in a variety of matters. Attorney regulation rules mean that this effort is not a preference, but instead, it is a duty.